83-792

No.

Office - Supreme Court, U.S.
FILED
NOV 10 1983
EVAS.
CLERK

In the

# Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT CALDEVILLA,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA

*Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT**

DENNIS A. BERKSON
One North LaSalle Street
Suite 2100
Chicago, Illinois 60602
312/726-7402
*Attorney for Petitioner*

The Scheffer Press, Inc.—(312) 263-6950

## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT SHOULD HAVE GRANTED PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING TO INTRODUCE EVIDENCE ESTABLISHING THAT THE CLASSIFICATION OF MARIJUANA IN SCHEDULE I OF THE CONTROLLED SUBSTANCES ACT IS UNCONSTITUTIONAL IN THAT IT IS ARBITRARY, IRRATIONAL AND DENIES THE DEFENDANT DUE PROCESS OF THE LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. WHETHER THE JURY VERDICT WAS CONTRARY TO THE LAW AND CONTRARY TO THE EVIDENCE.

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| OPINIONS BELOW | iv |
| JURISDICTION | iv |
| STATUTORY PROVISIONS | iv |
| STATEMENT OF FACTS | 1 |
| ARGUMENT | 4 |
| CONCLUSION | 29 |
| APPENDIX A | 1a |
| Opinion of the United States Court of Appeals, Eleventh Circuit, entered September 13, 1983 .. | 1a |
| APPENDIX B | 2a |
| Statutory Provisions | 2a |


## List Of Authorities Cited


*Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 299 (1938) ..... 23

*National Organization for the Reform of Marijuana Laws* v. *Drug Enforcement Administration*, 559 F.2d 735, 737 (D.C. Cir. 1977) ..... 8, 18, 24

*National Organization for the Reform of Marijuana Laws* v. *Ingersoll*, 497 F.2d 654 (D.C. Civ. 1974) ..... 5, 7, 8, 15, 24

*United States* v. *Conroy*, 589 F.2d 1258, 1269 (5th Cir. 1979) ..... 26, 28

## OPINIONS BELOW

The per curiam judgment of the United States Court of Appeals, Eleventh Circuit, was entered on September 13, 1983. A copy thereof is set out in Appendix A, *infra*. That judgment affirmed the decision of the trial court below.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 13, 1983. (*See* Appendix A, *infra*.) The jurisdiction of the Supreme Court is invoked pursuant to Title 28, United States Code, Section 1254.

## STATUTORY PROVISIONS

The relevant statutory provisions are set out in Appendix B, *infra*.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

*No.*

ROBERT CALDEVILLA,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA

*Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT**

## STATEMENT OF FACTS

Petitioner, Robert Caldevilla, was charged by indictment with conspiracy to possess with intent to distribute marijuana in violation of Title 21, United States Code, Sections 841(a)(i) and 846; and with conspiring to import marijuana into the United States in violation of Title 21, United States Code, Sections 952(a), 960(a)(i), and 963. (Vol. 1, R-1).

Following a plea of not guilty, (Vol. 1, R-20), Petitioner filed a Pre-trial Motion for an Evidentiary Hearing and to Dismiss the Indictment, alleging essentially

that marijuana was improperly classified as a Schedule I controlled substance. (Vol. 1, R-72). Said motion was denied, as well as Petitioner's motion to review the magistrate's order of denial. (Vol. 2, R-157, 163, 165).

Petitioner and his co-defendant, Angel Alvarez, proceeded to a jury trial before the Honorable Edward B. Davis. (Vol. 3, R-267), during which the following evidence was adduced:

Charles Martinez, a special agent, assigned to the aviation wing of DEA testified that he was contacted by Morris Kessler, whereafter he met with Kessler and Petitioner in Miami on July 7, 1980. (Vol. 2, R-284, Vol. 3, R-285, 288). Petitioner stated that there was a load of marijuana in Columbia and a DC-6 airplane in Costa Rica. Martinez was to fly from Costa Rica to Columbia, load the plane and fly to Tennessee, for which he would be paid two days after the marijuana was sold. (Vol. 3, R-289-290).

Martinez met with Petitioner and Peter Tranchida two days later. He was advised that the DC-6 was no longer available and stated that he could provide a plane. (Vol. 3, R-294-295).

The following day, Martinez again met with Petitioner and Tranchida, and was told that he was to fly to Columbia, pick up marijuana, fly to South Caicas and then to Bimini in the Bahamas, where the marijuana would allegedly be transferred to boats bound for South Florida. (Vol. 3, R-299-303). Angel Alvarez arrived during this meeting and advised that he had 30,000 pounds of marijuana in Columbia. (Vol. 3, R-301).

On July 28, 1980, after receiving a call from Petitioner, Martinez met with him and Alvarez at the Miami Air-

port. Martinez said he was to be given $20,000.00 before making the trip and he arranged to meet Petitioner later that day. (Vol. 3, R-308, 311). Because he did not in fact have an airplane available to him, Martinez suggested that the later meeting take place at a hotel instead of the airport. (Vol. 3, R-314, 315). Caldevilla and Martinez did meet later and Caldevilla then gave him $20,000.00 (Vol. 3, R-316).

Caldevilla testified that the meetings and telephone calls to which Martinez testified did occur. However, Caldevilla testified that no one ever told Martinez that the marijuana was going to the United States. (Vol. 3, R-362, 363, 366). And Martinez testified that the marijuana was to go to Canada. (Vol. 3, R-363).

The jury returned verdicts of guilty as to both counts, and following the denial of his post-trial motions, Petitioner was sentenced to four years in the custody of the Attorney General, as to each count, the sentences to run concurrently. (Vol. 2, R-217, 240, 243, 266).

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed the judgment of the trial court.

(See Appendix A, Infra).

## ARGUMENT

### I.

**THE COURT SHOULD HAVE GRANTED PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING TO INTRODUCE EVIDENCE ESTABLISHING THAT THE CLASSIFICATION OF MARIJUANA IN SCHEDULE I OF THE CONTROLLED SUBSTANCES ACT IS UNCONSTITUTIONAL IN THAT IT IS ARBITRARY, IRRATIONAL, AND DENIES THE DEFENDANT DUE PROCESS OF THE LAW AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

The defendant sought an evidentiary hearing to establish that the classification of marijuana in Schedule I of the Comprehensive Drug Abuse, Prevention and Control Act of 1970, 21 U.S.C., Sec. 801 *et seq.* ("Controlled Substances Act"), denies the defendant due process and equal protection in violation of the Fifth Amendment to the United States Constitution. The defendant sought to introduce evidence demonstrating:

1. That the Attorney General, the Drug Enforcement Administration, and the Secretary of Health, Education and Welfare have followed and continue to follow an unlawful policy of refusing to consider the reclassification of marijuana under the Controlled Substances Act;

2. That these agencies have frustrated the purpose of the Controlled Substances Act by totally refusing to initiate on their own the formal rule-making hearings contemplated by the Act for consideration of possible reclassification;

3. That these agencies have repeatedly and unlawfully refused to give appropriate consideration to a petition for reclassification filed in 1972 by interested parties. *National Organization for the Reform of Marijuana Laws* v. *Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974); and

4. That, although the *initial* placement of marijuana in Schedule I in 1970 may not have been arbitrary, it has become so in light of extensive scientific developments since then, particularly with respect to marijuana's therapeutic uses. Thus, the continuation of marijuana in Schedule I violates the Act itself and the Constitution.

The legislative history of the Act, and particularly the testimony of then Attorney General Mitchell and then Director of the Bureau of Narcotics and Dangerous Drugs Ingersoll, make clear that in the eyes of the sponsors of the legislation, the most important feature of the Act was the granting of discretion to the Attorney General to move drugs between one schedule and another. As Director Ingersoll explained in his testimony introducing the Controlled Substances Act:

> **"Perhaps the greatest advantage to this approach is that drugs may be moved from one schedule to another as scientific information and law enforcement problems come to light. . . . (B)y giving the Attorney General his discretion, the Congress will permit a quick response to the ever-changing drug problems based upon relative harm and relative abuse potential of existing drugs and newly discovered drugs."**

**Testimony of John Ingersoll before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee of the Judiciary, September 15, 1969, at pg. 241.**

Thus, the Controlled Substance Act was set up to be fair, scientific, and flexible.

Section 202 of the Controlled Substances Act, 21 U.S.C. Sec. 812, establishing the schedules of controlled substances provides that "such schedules shall *initially* consist of the substances listed." (Emphasis added.) Marijuana was initially classified in Schedule I, the most stringent classification. The legislative history reveals that Congress was uncertain whether to classify marijuana in Schedule I together with heroin and similar narcotic drugs, but decided to err on the side of caution in view of what it expected would be the future reclassification of marijuana into a lower schedule by the Attorney General upon the completion of studies, both pending and contemplated, into the health and safety issues surrounding marijuana:

> The committee requested recommendations from the Department of Health, Education and Welfare concerning the appropriate location of marijuana in the schedules of the bill, and by letter of August 14, 1970 . . . the Assistant Secretary for Health and Scientific Affairs recommended "that marijuana be retained within Schedule I at least until the completion of certain studies now underway."
>
> In addition, Section 601 of the bill provides for establishment of a Presidential Commission on Marijuana and Drug Abuse. The recommendation of this Commission will be of aid in determining the appropriate disposition of this question in the future.

H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. 13 (1970), 1970 U.S. Code Cong. & Admin. News 4579.

As the United States Court of Appeals for the District of Columbia Circuit has recognized, under the basic theory of the Controlled Substances Act:

> Congress contemplated that the classification set forth in the Act as originally passed would be subject to continuing review by the executive officials concerned, notably in the Department of Justice and the Department of Health, Education and Welfare. Provision was made for further consideration, one taking into account studies and data not available to Congress when the Act was passed in 1970.

*National Organization for the Reform of Marijuana Laws* v. *Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974). Section 201(a) of the Act, 21 U.S.C. Sec. 811, expressly delegates to the Attorney General the authority to transfer any drug between the schedules or to remove it altogether from control if he finds it not to "meet the requirements for inclusion in any schedule." Moreover, Congress provided that this process of continuing review and revision be accomplished in accordance with the Administrative Procedure Act, 5 U.S.C. Sec. 556-7 by rule-making "on the record after opportunity for a hearing . . ." 21 U.S.C. Sec. 811(a). Congress further provided that such proceedings for revision may be initiated by the Attorney General on his own motion, at the request of the Secretary of Heatlh, Education, and Welfare, or on the petition of any interested party. 21 U.S.C. Sec. 811(a).

Before initiating the formal proceedings for reclassification of a substance, the Attorney General is required to "request from the Secretary (of HEW) a scientific and medical evlaution, and his recommendations . . ." 21 U.S.C. Sec. 811(b). The Secretary is directed to consider certain factors listed in 21 U.S.C., Sec. 811(c)—pharmacological effect, risk to the public health, psychic or psychological dependence. He is also directed to consider any scientific or medical factors — such as actual

or relative potential for abuse; history and current pattern of abuse; and scope, duration, and significance of abuse. The Secretary's recommendations "shall be binding upon the Attorney General as to such scientific and medical matters . . ." 21 U.S.C. Sec. 811(b). Section 812(b) sets forth standards for the placement of substance in the various schedules, and requires findings with respect to these standards for placements or transfer.

These provisions — calling for a process of continuing review and modification by the executive officials of initial scheduling decisions made by the Congress — grew out of Congress' recognition "that the results of continuing research might cast doubt on the wisdom of initial classification assignments. . ." *National Organization for the Reform of Marijuana Laws* v. *Drug Enforcement Administration*, 559 F.2d 735, 737 (D.C. Cir. 1977). "Put in a larger setting, the provisions for modification of Schedules betoken the same approach of ongoing research, study, and supplemental consideration that characterize other provisions." *National Organization for the Reform of Marijuana Laws* v. *Ingersoll*, 497 F.2d 654, 657 (D.C. Cir. 1974). These other provisions include an express authorization to the Attorney General to undertake "studies or special projects to develop information necessary to carry out his (rescheduling) functions under Section 811 of this title." 21 U.S.C. Sec. 872(a)(6). In addition, the Act establishes a Presidential "Commission on Marjiuana and Drug Abuse" and directs it to conduct a study of marijuana and submit reports containing recommendations for legislative and administrative action. 21 U.S.C. Sec. 801.

Petitioner sought to show by way of an evidentiary hearing that the Attorney General, the Drug Enforcement Administration ("DEA") and the Secretary of HEW, have totally frustrated these basic provisions of the Controlled Substances Act by refusing to lower the classification of substances, unless and until directed to do so by Congress. This is demonstrated by the refusal of these officials to initiate on their own the formal hearings contemplated by the Act for consideration of possible reclassification, notwithstanding significant scientific developments since 1970, that, at a minimum, provide substantial evidence that marijuana should be subjected to lesser control.

Moreover, the Attorney General and his delegates have repeatedly and unlawfully refused to give appropriate consideration to a petition for reclassification filed in 1972 by the National Organization for the Reform of Marijuana Laws (NORML). Since its initial filing, the relevant agencies have on three occasions either refused to accept the petition or denied it without the requisite hearings. In each instance, NORML appealed to the United States Court of Appeals for the District of Columbia Circuit, which each time ordered the agencies to reconsider. The blatantly lawless refusal by these agencies to perform an essential aspect of the Controlled Substances Act illustrates the total abdication of their Statutory responsibilities. Petitioner contends that the unlawful conduct of these agencies has effectively frozen the placement of marijuana in Schedule I, despite Congress' express contemplation that the "initial" scheduling be revised in the light of developing knowledge. By totally frustrating this essential aspect of the legislative scheme, these agencies have rendered the act a nullity,

with the result that prosecution under it violates basic notions of due process.

The House Report relied on the recommendation of HEW that marijuana be placed in Schedule I "at least until the completion of certain studies now underway," and projected that the Presidential Commission's recommendations "will be of aid in determining the appropriate disposition of this question in the future." H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. 13 (1970), 1970 U.S. Code Cong. and Admin. News 4579.

In the years since Congress made this initial classification decision, an impressive body of scientific knowledge has emerged concerning the effects of marijuana.

For instance, in 1971, Dr. Lester Grinspoon's encyclopedic work, *Marijuana Reconsidered* (1971) was published. Grinspoon documented the conclusions reached by earlier researchers that moderate use of marijuana causes no physical or psychological harm to users, *id.* at 370-71; is not addicting, *id.* at 223; has never been shown to have caused the death of any user, *id.* at 227; does not produce psychosis, *id.* at 253 ff.; does not lead to use of other drugs such as heroin, *id.* at 253 ff.; does not lead to criminal or otherwise violent behavior, *id.* at 308-309, 311-12; and is not an aphrodisiac *id.* at 312 ff.

In passing the Controlled Substances Act, Congress established a Presidential Commission to study marijuana and reevaluate its benefits and dangers, 21 U.S.C. Sec. 801 note. The legislative history notes that "(t)he recommendations of this Commission will be of aid in determining the appropriate disposition of this question in the future." H.R. Rep. No. 91-1444 (Part 1), 91st Cong., 2d Sess. 13 (1970), 1970 U.S. Code Cong. and

Admin. News 4579. The Official Report of the National Commission on Marijuana and Drug Abuse, entitled *Marijuana: A signal of Misunderstanding* (1972), (hereinafter cited as "Shaffer Report,") was issued in 1972, and found no conclusive evidence that marijuana was harmful:

> A large amount of research has been performed in man and animals regarding the immediate effect of marijuana on bodily processes. . . . Such studies seemed to indicate that safe human study could be undertaken over a wide dose range. . . . These few Consistently observed transient effects on bodily function seem to suggest that marijuana is a rather unexciting compound of negligible immediate toxicity at the doses usually consumed in this country. The substance is predominantly a psychoactive drug. The feelings and state of consciousness described by the intoxicated seem to be far more interesting than the objective state noted by an observer.

*Id.* at 56-57. The Shaffer Commission surveyed scientific literature and conducted its own study of young adults engaged in long term use of marijuana and concluded: "No significant physical, biochemical, or mental abnormalities could be attributed solely to . . . marijuana smoking." *Id.* at 61. Even among subjects who had used very strong preparations of marijuana; i.e., ganja and hashish, for very long periods of time, the Commission found that:

> No significant physical or mental abnormalities would be attributed to marijuana use, according to an evaluation of medical history, complete physical examination, chest X-ray, electrocardiogram, blood cell and chemistry tests, selected hormone evaluation, and psychological testing. There was no evidence to indicate the drug as commonly used was

> **responsible for producing birth defects in off-spring of users.**

*Id.* at 63.

The Shaffer Commission further concluded that use of marijuana generally does not cause any significant psychological disturbance or aberration. *Id.* at 59. When study subjects were given high doses of marijuana over several weeks, "no harmful effects were observed on general bodily functions, motor functions, mental functions, personal or social behavior or work performance." *Id.* at 60. Nor is there evidence that long-term use of marijuana directly causes alienation, "dropping out," or loss of motivation. *Id.* at 62. The studies failed to demonstrate any significant difference in mental or social functioning, occurrence of psychosis, motivation, or behavioral changes between even very heavy, very long-term users of cannabis preparations and the non-using populations. *Id.* at 63-64.

Reports by the United States Department of HEW in 1972, 1973, 1974, and 1975 consistently concluded that numerous studies had failed to demonstrate any causal connection between use of marijuana and loss of motivation, brain damage, birth defects or "chromosome breaks." *Marijuana and Health, Second Annual Report to Congress from the Secretary of Health, Education and Welfare*, 129-53 (1973); *Marijuana and Health, Fourth Annual Report to Congress from the Secretary of Health, Education, and Welfare*, 93-121 (1974); *Marijuana and Health, Fifth Annual Report to Congress from the Secretary of Health, Education, and Welfare*, 78-112 (1975).

Additional studies have been published which indicate that even very heavy use of cannabis over long periods of time does not have deleterious physiological or psychological effects. *See, e.g.*, Mendelson, ***Behavioral and Biological Concomitants of Chronic Marijuana Use*** (U.S. Army Medical Research and Development Command 1974).

Particularly significant is a study conducted in Jamaica for the National Institute of Mental Health, United States Department of HEW, in which the study subjects were thirty males who had smoked an average of seven marijuana cigarettes of relatively high potency each day for an average of *seventeen* years, and thirty controls. The results of the study support the findings of the Shaffer Commission: no significant physiological or psychological differences were found between long-term smokers and non-smokers, there was no evidence of physical dependency (addiction) severe overdose reactions, insanity, cerebral atrophy, brain damage, personality deterioration, or "amotivational syndrome." V. Rubin and L. Comitase, *Ganja in Jamaica* 83-84, 1500151, 165-166 (1975).

Perhaps the most significant scientific research on marijuana in recent years deals with its therapeutic effects. The Controlled Substances Act requires the placement in Schedule I of any drug that "has no currently accepted medical use in treatment in the United States." *See* 21 U.S.C. Sec. 812(b)(1)(B). Grinspoon, *supra*, at 247-49, reported on research revealing the anti-convulsant properties of marijuana, its anti-bacterial properties and its usefulness in assisting withdrawal and opiate addiction. Recent studies have reported usefulness in treatment of high blood pressure, *id.* at 255; glaucoma,

e.g., Hepler and Frank, Marijuana Smoking and Intraocular Pressure, 217 J.A.M.A. 1391 (1971); and asthma, Tashkin, et al., *Acute Pulmonary Physiological Effects of Smoked Marijuana and Oral Tetra-Hydrocannabinol in Healthy Young Men,* 289 NewEngl. J. Med. 336 (1973).

The sixth annual HEW report specifically refers to research demonstrating therapeutic uses of marijuana in the treatment of glaucoma, cancer, and asthma. *Marijuana and Health Sixth Annual Report to Congress from the Secretary of Health, Education and Welfare,* 25-26 (1976). In the last several years, a substantial body of research has emerged concerning the therapeutic use of marijuana in the reduction of inter-ocular pressure in patients with glaucoma, and the control of nausea and vomiting associated with cancer chemotherapy. E.g., S. Cohen and R.C. Stillman eds., *Therapeutic Potential of Marijuana* (1976). In fact so widespread has been the research on and acceptance of the therapeutic effects of marijuana that twenty-five states, including Florida, have in the past few years authorized the use of marijuana for medical purposes. Controlled Substance Therapeutic Research Act., Fla. Stat., Sec. 402.36 (1979) (finding that "the use of cannabis may alleviate the nausea and ill-effects of cancer chemotherapy, and may alleviate the ill-effects of glaucoma. . .").

This impressive body of scientic knowledge strongly suggests that the potential for abuse is far less serious than had been supposed and further documents a number of important medical uses for the substance. Thus, the failure of the Attorney General, of DEA, and of the Secretary of HEW to initiate the proceedings provided for in the Controlled Substances Act to *consider* the reclassification of marijuana is nothing less than start-

ling. In the instant case, Petitioner sought to call expert witnesses to testify as to scientific evidence on marijuana and to establish that such evidence was well known to the relevant agencies. Their failure even to consider reclassification pursuant to the provisions of the Controlled Substances Act would have been shown to be part of a concerted policy to freeze marijuana's classification in Schedule I, notwithstanding the knowledge of these agencies supporting reclassification in a lesser schedule.

As noted above, proceedings for reclassification may also be initiated "on the petition of any interested part." 21 U.S.C. Sec. 811(a)(2). "The Executive (thus) has a corollary responsibility to give appropriate consideration to petitions for reclassification." *National Organization for the Reform of Marijuana Laws* v. *Ingersoll*, 497 F.2d 654, 657 (D.C. Cir. 1974). Moreover, this responsibility is required as well by the Administrative Procedure Act, which mandates that each agency "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. Sec. 553(e).

On May 18, 1972, some two months after the issuance of the Shaffer Commission report, the National Organization for the Reform of Marijuana Laws ("NORML"), the Institute for the Study of Health and Society, and the American Public Health Association petitioned the Director of the Bureau of Narcotics and Dangerous Drugs, the predecessor agency of DEA, to initiate proceedings to remove marijuana from control under the Controlled Substances Act, or alternatively, to transfer it from Schedule I to Schedule V. On September 1, 1972, the Director refused even to accept the petition for filing. 37 Fed. Reg. 18097 (1972), based on his conclusion that decontrol or reclassification of mari-

juana would violate United States treaty obligations under the Single Convention, and his conclusion that 21 U.S.C. Sec. 811(d) gave him sole authority over the scheduling of substances controlled by treaty, without regard to the referral and rule-making procedures specified in 21 U.S.C. Sec. 811(a)-(c). *Id.* at 18098.

NORML sought review of the Director's decision with the United States Court of Appeals for the District of Columbia Circuit. 497 F.2d 654 (D.C. Cir. 1974).

That Court reversed and remanded finding that this "was not the kind of agency action that promoted the kind of interchange and refinement of views that is the life-blood of a sound administrative process." *Id.* at 659, and called for "a new look and a hard look at the questions raised by the petition." *Id.* at 661. The court indicated that on remand, in view of the treaty's exclusion of separated leaves from the terms "cannabis" and "cannabis resin," the agency should separately consider rescheduling the leaves of the marijuana plant, *Id.* at 660, and suggested that the proceedings on remand be divided into two phases:

> In the first phase, the Department of Justice could consider whether there is any latitude (to reschedule) consistent with treaty obligations, and herein receive expert testimony limited to this treaty issue. The second phase would arise only if some latitude were found, and would consider how the pertinent executive discretion should be exercised.

*Id.* at 661, n. 17. In connection with this "second phase" the court commented on the Director's argument that scheduling of marijuana was a matter entrusted to his sole discretion:

> This is a matter that gives us pause. The respondent seems to be saying that even though the treaty does not require more control than Schedule V provides, he can on his own say-so and without any reason insist on Schedule I. We doubt that this was the intent of Congress.

*Id.* at 660-61.

Some three months after the court's decision, DEA announced in the Federal Register that the agency was prepared to hold a hearing to determine the regulatory controls necessary to satisfy the Single convention. 39 Fed. Reg., 23072 (1974). In response, NORML and the American Public Health Association requested a "phase one" hearing on this issue, specifically requesting an inquiry as to whether separated leaves and/or seeds of the marijuana plant could be removed from Schedule I.

Some six months later, on January 28, 1975, a hearing was commenced. Administrative Law Judge Parker, who after three days of testimony by witnesses by both sides, issued a report holding that, consistent with the Single Convention, "cannabis" and "cannabis resin" could be rescheduled to Schedule II; cannabis leaves could be rescheduled to Schedule V; and cannabis seeds and "synthetic cannabis" could be decontrolled. He further rejected DEA's interpretation of 21 U.S.C. Sec. 811(d) that had given the Court of Appeals "pause," and held that in the second phase of the rescheduling proceeding, the agency should follow the referral and hearing procedures mandated by 21 U.S.C. Sec. 811(a)-(c).

DEA, however, declined to conduct the referral and formal rule-making hearing procedures mandated by the statute. DEA concluded that marijuana could not be removed from Schedule I, citing a 1975 letter from Dr.

Theodore Cooper, acting Assistant Secretary for Health, that there "is currently no accepted medical use of marijuana in the United States" and "no approved New Drug Application" for marijuana on file with the Food and Drug Administration. DEA then determined that the Attorney General could not remove marijuana from Schedule I "no matter the weight of the scientific or medical evidence which petitioners might adduce. . ." 40 Fed. Reg. 44164, 44167 (1975).

On October 22, 1975, NORML filed its second petition for review before the United States Court of Appeals for the District of Columbia Circuit. Agreeing with Administrative Law Judge Parker's conclusions as to the scheduling options left open by the treaty, NORML urged the court to reverse and remand the case for further procedings, to include referral of the rescheduling petition to the Secretary of HEW, which DEA had refused to do, pursuant to 21 U.S.C. Sec. 811(b)-(c).

The court agreed, rejecting DEA's restrictive interpretation of 21 U.S.C. Sec. 811(d). *National Organization for Reform of the Marijuana Laws* v. *Drug Enforcement Administration*, 559 F.2d 735, 747 (D.C. Cir. 1977). DEA's questionable interpretation of Sec. 811(d) was the same one that had given "pause" to the court in its previous decision in *Ingersoll. Supra.* at 660. The court found that "once that minimum schedule (consistent with the treaty) is established by the Attorney General, the decision whether to impose controls more restrictive than required by treaty implicates the same medical and scientific considerations as do scheduling decisions regarding those substances not controlled by treaty. The Secretary of HEW is manifestly more competent to

make these non-legal evaluations and recommendations." *Id.* at 747.

The Court of Appeals also rejected as erroneous DEA's "assumption that placement in CSA Schedule 1 is automatically required if the substance has no currently accepted medical use in the United States." 559 F.2d at 747. Rather, the Court found "an intent to reserve to HEW a finely-tuned balancing process involving several medical and scientific considerations." *Id.* at 748. The court inveighed against the agency's "short-cutting the referral procedures" of the Controlled Substances Act, which "precluded the balancing process contemplated by Congress." *Id.* at 748. Moreover, the court found that "even if lack of medical use is dispositive of a classification decision, we do not think the finding in this case was established in conformity with the statute." *Id.* at 748-49.

In strong and critical language, supportive of Petitioner's view that the agency acted pursuant to an unlawful policy of refusing even to consider the possibility of reclassification of marijuana until and unless the Congress required it, the court scolded the agency:

> In order to prevent unfair and uninformed decisions on petitions to reschedule substances under the CSA, the Act establishes specific procedures that the agency must follow. By circumventing those procedures, DEA usurped the powers reserved to HEW and worked a hardship on petitioner. Whatever the Acting Administrator's conclusions, we cannot countenance actions in derogation of a statutory mandate.

*Id.* at 750 n.64.

The court also castigated the DEA's Administrator for acting "prematurely in making his determination." *Id.* at 754. Rather than deciding the issue without the formal referral procedures contemplated by the statute, DEA should have sought HEW's

> recommendations (which) would have set the upper limits of the Acting Administrator's discretion to reschedule. The issue could then have been fully litigated at a DEA rulemaking hearings. At that point in the proceedings, the Acting Administrator would have been in a far better position to make an informed determination. The Acting Administrator's determination in this case was not made in conformity with Section 201(a)-(c). We owe no deference to a statutory invalid exercise of discretion.

*Id.* at 754. The court instructed DEA to refer the NORML petition to HEW for medical and scientific findings and recommendations for rescheduling with respect to each of four separate categories of marijuana material. "Following receipt of the Secretary's evaluations and recommendations, the Acting Administrator is directed to comply with the rule-making procedures outlined in Section 201(a)-(b)." *Id.* at 757.

Two months after the remand, DEA in accordance with the court's instructions, referred NORML's petition to the Secretary of HEW, who took virtually two years berore responding in a conclusionary letter dated June 4, 197. 44 Fed. Reg. 35125-27.

The HEW report illustrates the government's continued unwillingness to consider exercising the discretion ordered by the statute. For instance, although ordered "to make separate evaluations and recommendations for each of" four separate categories of cannabis material, 559 F.2d at 757, HEW lumped three of these categories

together. 44 Fed. Reg. 36125-26. The report, in discussing marijuana's potential for abuse, refers only to the number of Americans who use, as if "use" and "abuse" were equivalent terms. 44 Fed. Reg. 36125. Further, the report fails to consider the pharmacological and physiological effects of marijuana relative to the substantially more serious effects of other Schedule I substances, or, for that matter, compared to substance in lesser Schedules or even alcohol and tobacco which are unscheduled. 44 Fed. Reg. 36126.[1] Without such a *comparative* consideration, the report fails altogether to provide a scientific basis on which a serious consideration of the reclassification question can be conducted.

The HEW report's discussion of the medical uses of marijuana amply illustrates the continued government's unwillingness to exercise the discretion contemplated by the statute. Conceding that the substances in question were the subject of Investigational New Drug Applications for several potential therapeutic uses, the HEW report nonetheless concluded that these "have no currently accepted use and treatment in the United States."

---

[1] The report's discussion of marijuana's "psychic or physiological dependence liability," although concluding that "(f)urther research is needed . . .," significantly finds:

> No convincing evidence . . . to suggest that abuse of natural marijuana plant materials lead to severe psychological or physical dependence. Three studies supported by the National Institute of Drug Abuse of chronic cannabis users in Jamaica, Greece, and Costa Rica detected no evidence of development of a cannabis psychosis (See Ref.2). Moreover, it has been suggested that changes in values and behavior previously attributed to cannabis use may have preceded rather than resulted from usage. (Refs. 2 & 3).

34 Fed. Reg. 36127. Significantly, the report conceded that "(c)onceivably, the current *investigational* use of some of the substances could be classified as 'a currently accepted medical use with severe restrictions' within the meaning of the second criterion for Schedule II." *Id.* Nonetheless, the report found that "its appropriateness is not free from doubt. Consequently, the substances fit more readily into Schedule I." *Id.*

Although HEW recognized that marijuana and synthetic THC are presently being used in medical treatment in the United States, the report rejected the rescheduling proposal, because this treatment was not "accepted medical use" within the meaning of the statute. This latter finding, of course, is a legal conclusion beyond the expertise of the agency and its proper resolution is a matter for the court.

The HEW report also preferred Schedule I rather than Schedule II in view of the Schedule I criterion that there is a "lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. Sec. 812(b)(1)(C). Without any discussion or analysis the report simply concluded that "due to the substantial unanswered questions about the efficacy and safety of medical use of these substances, it is clear that there is a lack of accepted safety for use of these substances under medical supervision." This conclusion is totally inconsistent with the facts as we understand them to be. In our view an evidentiary hearing would have adequately documented that there is *no* lack of accepted safety when the drug is used under medical supervision as it extensively is and has been in this country for the past several years.

Upon receipt of the HEW report, DEA denied NORML's petition without the required hearing. 44 Fed. Reg. 36123. In so doing, the DEA violated not only the statute and the court's remand, but also its own regulation governing the initiation of rule-making proceedings for the rescheduling of controlled substances. 21, C.F.R. Sec. 1308 44(9e). Surely the factual findings in the HEW report, at the very least, present substantial evidence that the drug should be subjected to lesser controls. The report's conclusion "that the substances we have reviewed would be placed in either Schedule I or Schedule II," *Id.* at 36127, alone meets the regulatory standard that the drug should be subjected to lesser control than Schedule I. All that is needed to meet the substantial evidence test is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . ." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 299 (1938). Even if there is not sufficient evidence to justify the reclassification sought by NORML, plainly the HEW report itself provides evidence sufficient to invoke the formal rule-making hearing required by DEA's own regulations, the Act, and the court's remand. The agency thus, once again, unlawfully denied NORML its opportunity for a rule-making hearing which is a vital feature of the Controlled Substances Act.

For a third time, NORML petitioned the Court of Appeals for the District of Columbia Circuit for review. On September 10, 1980, the Surgeon General announced that the government had approved a plan to allow four thousand cancer specialists nationwide to use synthetic THC pills to control the side effects of nausea and vomiting resulting from cancer treatment. *San Fran-*

*cisco Chronicle,* October 16, 1980, at p. 14. At a hearing on NORML's petition before the Court of Appeals held one month later, the Justice Department represented that the Department of health and Human Resources (successor to HEW) would reconsider its position on medical use of synthetic THC. The court not only remanded the case to the DEA to consider this issue, but *sua sponte* ordered reconsideration "of all the issues in this case . . . ," and to "refer all the substances at issue to the Department of Health and Human Resources for that Department's scientific and medical findings and recommendations on Scheduling as provided by 21 U.S.C. Sec. 811(b) (1976). These proceedings shall take into account new evidence concerning medical use of the substances at issue and shall be consistent with both this order and the prior decisions of this court in *National Organization for the Reform of Marijuana Laws* v. *Drug Enforcement Administration,* 559 F.2d 735 (D.C. Cir. 1977) and *National Organization for the Reform of Marijuana Laws* v. *Ingersoll,* 497 F.2d 654 (D.C. Cir. 1974)." No. 79-1660, October 1980.

The court castigated the agencies for not following the court's prior decisions:

> "We regretably find it necessary to remind respondents of an agency's obligation on remand not to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of (the) court deciding the case."

Thus for the third time in this protracted litigation the Court of Appeals reversed the agencies and remanded for a full and fair consideration of the petition for reclassification pursuant to statutory requirements.

The history of NORML's rule-making petition is cited here at great length to provide graphic illustration that these agencies have followed a blatantly unlawful policy of refusing to even consider the exercise of discretion that Congress deems an essential aspect of the Controlled Substances Act. The Court of Appeals has strongly criticized these agencies on three separate occasions for their bad faith in ignoring a substantial body of scientific knowledge concerning the effects of marijuana that has emerged in the past ten years, and steadfastly refusing to conduct formal rule-making proceedings for the possible reclassification of marijuana.

At the evidentiary hearing which Petitioner requested, he sought to present testimony concerning the effects of marijuana and its medical uses, and to further demonstrate that the agencies in question acted in an arbitrary and unlawful manner, contrary to the will of Congress, by refusing even to consider the reclassification of marijuana until and unless Congress required it. As a result of this blatantly lawless action, the basic review and revision components of the Controlled Substances Act were and continue to be violated, depriving the Act of its authority as a penal prohibition on the unauthorized use or possession of marijuana.

## II.

## THE JURY VERDICT WAS CONTRARY TO THE LAW AND CONTRARY TO THE EVIDENCE.

The Petitioner was charged with conspiring to possess with intent to distribute over 1,000 pounds of marijuana in violation of Title 21, United States Code, Sections 841(a)(1), 846, and with conspiring to import marijuana into the United States from a place outside thereof

in violation of Title 21, United States Code, Sections 952(a), 960(a)(1), and 963 (Vol. 1, R-1).

As to both charges, the Government had the burden of proving an agreement among the defendants, the intended purpose of which was a violation of United States law. *United States* v. *Conroy,* 589 F.2d 1258, 1269 (5th Cir. 1979), and thus, that any marijuana that was to be possessed, distributed, or imported was intended to come into the United States. *Conroy* at 1270.

At trial, agent Martinez testified for the Government that he met several times with Mr. Caldevilla, Mr. Alvarez and others. He testified that he met Mr. Caldevilla on July 7, 1980, and discussed flying a DC-6 from Costa Rica to Columbia, picking up marijuana and flying to Tennessee. (Vol. 3, R-288, 289). On July 9, 1980, Mr. Martinez met with Mr. Caldevilla and was told that the DC-6 was no longer available and Mr. Martinez said he could provide a Conrair. (Vol. 3, R-294, 295). On July 10, 1980, Mr. Martinez met Mr. Caldevilla and was told that he would fly to Columbia with a navigator who would identify where to pick up the marijuana. (Vol. 3, R-302). He said he was told that he would fly to South Caicos, then to Bimini where the marijuana would be off loaded to trucks and then allegedly to boats bound for South Florida. (Vol. 3, R-302, 303). Mr. Martinez met Mr. Caldevilla at the Ramada Inn on July 28 and received $20,000 advanced payment for the flight. (Vol. 3, R-316). By prior arrangement, Mr. Martinez was stopped by a highway patrolman on his way to the airport. (Vol. 3, R-316). Mr. Caldevilla, who was in another car, continued on. (Vol. 3, R-317).

Mr. Caldevilla testified that the meetings that Mr. Martinez testified to did occur. (Vol. 3, R-362). Mr.

Caldevilla's testimony only varied from that of Mr. Martinez as to one vitally important aspect. Mr. Caldevilla testified that neither he nor anyone else ever told Mr. Martinez that the marijuana was going from Bimini to the United States. (Vol. 3, R-363). Rather, Mr. Caldevilla testified that the marijuana was eventually to end up in Canada. (Vol. 3, R-363).

Significantly, the only difference between the testimony of Mr. Caldevilla and Mr. Martinez is the alleged statement that the marijuana was to be loaded on boats at Bimini and sent to Florida. However, this difference can easily be explained as follows: First, Mr. Martinez admitted that without his testimony regarding the United States as a destination, the charge against the defendant could not be proved. (Vol. 3, R-325, 326).

One must remember that there never was any flight and that no marijuana was ever transported anywhere. (Vol. 3, R-322), and aside from the testimony of Mr. Martinez, there is absolutely no corroboration that anything was to be brought into the United States. (Vol. 3, R-325). Mr. Martinez was not to be involved at all after Bimini, so there was no reason to provide him with any information regarding events after Bimini. (Vol. 3, R-322, 323). Mr. Martinez testified on cross-examination that other agents are brought into cases to corroborate what is said. (Vol. 3, R-323, 324), but no other agent was used in the instant case. Mr. Martinez also testified that electronic recording equipment was available and that transmitters were available, but he chose not to use any of these devices. (Vol. 3, R-324). More significantly, there is no reason to assume that the defendants told Mr. Martinez where the marijuana was

going, when they did not trust him enough to tell him where it was coming from. He was to be provided a navigator to tell him where to land in Columbia, and he was never told a specific location in Columbia. (Vol. 3, R-332). Most important, at the meeting on July 10 when the conversation allegedly took place, Mr. Martinez was recognized by one, Octavio Pino, who had been arrested and incarcerated by Mr. Martinez, and who told the defendants that Mr. Martinez was an agent. (Vol. 3, R-334, 335). To believe that Mr. Caldevilla told Mr. Martinez anything about where the marijuana was going in view of this meeting is patently ridiculous. If there was the slightest chance that Martinez was an agent, telling where the marijuana was going so that he could arrest the defendents and intercept the marijuana would be absurd.

While one may feel that anyone who deals with marijuana is morally wrong, it does not justify ignoring the law to punish that person. In view of the one-on-one nature of the conversations, the total lack of corroboration and the fact that those involved were put on notice that Mr. Martinez could be an agent, no reasonable man could believe that Mr. Martinez was ever given any information beyond what was absolutely necessary—and that information stopped at Bimini. The Government failed to meet its burden to prove that any marijuana that was to be possessed, distributed, or imported was ever meant to come into the United States as dictated by *United States* v. *Conroy*, 589 F.2d 1258, 1270 (5th Cir. 1979). Therefore, the jury's verdict was contrary to the law and to the evidence and should be reversed.

## CONCLUSION

For the foregoing, Petitioner respectfully requests this Honorable Court to grant the instant request for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the trial court.

Respectfully submitted,

DENNIS A. BERKSON
One North LaSalle Street
Suite 2100
Chicago, Illinois 60602
312/726-7402
*Attorney for Petitioner*

**APPENDIX A**

---

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-6016
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

*vs.*

ROBERT CALDEVILLA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Florida

(September 13, 1983)

Before FAY, VANCE and KRAVITCH, *Circuit Judges.*

Per Curiam: AFFIRMED. See Circuit Rule 25.

## APPENDIX B

1. The following statutes are those under which Petitioner was charged, and are not dispositive of the issues herein:

Title 21, United States Code, Section 841 provides in part as follows:

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . .

Title 21, United States Code, Section 846, provides as follows:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21, United States Code, Section 952, provides in part as follows:

§952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States, or to import into the United States from any place out-

side thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United Staates—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Title 21, United States Code, Section 960, provides in part as follows:

§ 960. Prohibted acts A

Unlawful acts

(a) Any person who—

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

• • •

shall be punished as provided in subsection (b) of this section.

Title 21, United States Code, Section 963, provides as follows:

§ 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

2. The following statutory provisions are relied upon by Petitioner in support of his arguments herein:

Title 21, United States Code, Section 801 provides as follows:

§801. Congressional findings and declarations

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

Title 21, United States Code, Section 811, provides in part as follows:

§ 811. Authority and criteria for classification of substances

Rules and regulations of Attorney General; hearing

(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

Evaluation of drugs and other substances

(b) The Attorney General shall, before initiating proceedings under subsection (a) of this section to control a drug or other substance or to remove a drug or other substance entirely from the schedules, and after gathering the necessary data, request from the Secretary a scientific and medical evaluation, and his recommendations, as to whether such drug or other substance should be so controlled or removed as a controlled substance. In making such evaluation and recommendations, the Secretary shall consider the factors listed in paragraphs (2), (3), (6), (7), and (8) of subsection (c) of this section and any specific or medical considerations involved in paragraphs (1), (4), and (5) of such subsec-

tion. The recommendations of the Secretary shall include recommendations with respect to the appropriate schedule, if any, under which such drug or other substance should be listed. The evaluation and the recommendations of the Secretary shall be made in writing and submitted to the Attorney General within a reasonable time. The recommendations of the Secretary to the Attorney General shall be binding on the Attorney General as to such scientific and medical matters, and if the Secretary recommends that a drug or other substance not be controlled, the Attorney General shall not control the drug or other substance. If the Attorney General determines that these facts and all other relevant data contstitute substantial evidence of potential for abuse such as to warrant control or substantial evidence that the drug or other substance should be removed entirely from the schedules, he shall initiate proceedings for control or removal as the case may be, under subsection (a) of this section.

Factors determinative of control or removal from schedules

(c) In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

International treaties, conventions, and protocols requiring control; procedures respecting changes in drug schedules of Convention on Psychotropic Substances

(d)(1) If control is required by United States obligations under international treaties, conventions, or protocols in effect on October 27, 1970, the Attorney General shall issue an order controlling such drug under the schedule he deems most appropriate to carry out such obligations, without regard to the findings required by subsection (a) of this section or section 812(b) of this title and without regard to the procedures prescribed by subsections (a) and (b) of this section.

(2)(A) Whenever the Secretary of State receives notification from the Secretary-General of the United Nations that information has been transmitted by or to the World Health Organization, pursuant to article 2 of the Convention on Psychotropic Substances, which may justify adding a drug or other substance to one of the schedules of the Convention, transferring a drug or substance from one schedule to another, or deleting it from the schedules, the Secretary of State shall immediately transmit the notice to the Secretary of Health and Human Services who shall publish it in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the scientific and medical evaluations which he is to prepare respecting such drug or substance. The Secretary of Health and Human Services shall prepare for transmission

through the Secretary of State to the World Health Organization such medical and scientific evaluations as may be appropriate regarding the possible action that could be proposed by the World Health Organization respecting the drug or substance with respect to which a notice was transmitted under this subparagraph.

(B) Whenever the Secretary of State receives information that the Commission on Narcotic Drugs of the United Nations proposes to decide whether to add a drug or other substance to one of the schedules of the Convention, transfer a drug or substance from one schedule to another, or delete it from the schedules, the Secretary of State shall transmit timely notice to the Secretary of Health and Human Services of such information who shall publish a summary of such information in the Federal Register and provide opportunity to interested persons to submit to him comments respecting the recommendation which he is to furnish, pursuant to this subparagraph, respecting such proposal. The Secretary of Health and Human Services shall evaluate the proposal and furnish a recommendation to the Secretary of State which shall be binding on the representative of the United States in discussions and negotiations relating to the proposal.

(3) When the United States receives notification of a scheduling decision pursuant to article 2 of the Convention on Psychotropic Substances that a drug or other substance has been added or transferred to a schedule specified in the notification or receives notification (referred to in this subsection as a "schedule notice") that existing legal controls applicable under this subchapter to a drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act do not meet the requirements of the schedule of the Convention in which such drug or substance has been placed, the Secretary of Health

and Human Services, after consultation with the Attorney General, shall first determine whether existing legal controls under this subchapter applicable to the drug or substance and the controls required by the Federal Food, Drug, and Cosmetic Act, meet the requirements of the schedule specified in the notification or schedule notice and shall take the following action:

(A) If such requirements are met by such existing controls but the Secretary of Health and Human Services nonetheless believes that more stringent controls should be applied to the drug or substance, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance, pursuant to subsection (a) and (b) of his section, to apply to such controls.

(B) If such requirements are not met by such existing controls and the Secretary of Health and Human Services concurs in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall recommend to the Attorney General that he initiate proceedings for scheduling the drug or substance under the appropriate schedule pursuant to subsections (a) and (b) of this section.

(C) If such requirements are not met by such existing controls and the Secretary of Health and Human Services does not concur in the scheduling decision or schedule notice transmitted by the notification, the Secretary shall—

(i) if he deems that additional controls are necessary to protect the public health and safety, recommended to the Attorney General that he initiate proceedings for scheduling the drug or substance pursuant to subsections (a) and (b) of this section, to apply such additional controls;

(ii) request the Secretary of State to transmit a notice of qualified aceptance, within the period specified in the Convention, pursuant to para-

graph 7 of article 2 of the Convention, to the Secretary-General of the United Nations;

(iii) request the Secretary of State to transmit a notice of qualified acceptance as prescribed in clause (ii) and request the Secretary of State to ask for a review by the Economic and Social Council of the United Nations, in accordance with paragraph 8 of article 2 of the Convention of the scheduling decision; or

(iv) in the case of a schedule notice, request under the Convention to initiate proceedings to the Secretary of State to take appropriate action remove the drug or substance from the schedules under the Convention or to transfer the drug or substance to a schedule under the Convention different from the one specified in the schedule notice.

(4)(A) If the Attorney General determines, after consultation with the Secretary of Health and Human Services, that proceedings initiated under recommendations made under paragraph (B) or (C)(i) of paragraph (3) will not be completed within the time period required by paragraph 7 of article 2 of the Convention, the Attorney General, after consultation with the Secretary and after providing interested persons opportunity to submit comments respecting the requirement of the temporary order to be issued under this sentence, shall issue a temporary order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of article 2 of the Conven-

tion. In the case of proceedings initiated under subparagraph (B) of paragraph (3), the Attorney General, concurrently with the issuance of such order, shall request the Secretary of State to transmit a notice of qualified acceptance to the Secretary-General of the United Nations pursuant to paragraph 7 of article 2 of the Convention. A temporary order issued under this subparagraph controlling a drug or other substance subject to proceedings initiated under subsections (a) and (b) of this section shall expire upon the effective date of the application to the drug or substance of the controls resulting from such proceedings.

(B) After a notice of qualified acceptance of a scheduling decision with respect to a drug or other substance is transmitted to the Secretary-General of the United Nations in accordance with clause (ii) or (iii) of paragraph (3)(C) or after a request has been made under clause (iv) of such paragraph with respect to a drug or substance described in a schedule notice, the Attorney General, after consultation with the Secretary of Health and Human Services and after providing interested persons opportunity to submit comments respecting the requirements of the order to be issued under this sentence, shall issue an order controlling the drug or substance under schedule IV or V, whichever is most appropriate to carry out the minimum United States obligations under paragraph 7 of article 2 of the Convention in the case of a drug or substance for which a notice of qualified acceptance was transmitted or whichever the Attorney General determines is appropriate in the case of a drug or substance described in a schedule notice. As a part of such order, the Attorney General shall, after consultation with the Secretary, except such drug or substance from the application of any provision of part C of this subchapter which he finds is not required to carry out the United States obligations under paragraph 7 of

article 2 of the Convention. If, as a result of a review under paragraph 8 of article 2 of the Convention of the scheduling decision with respect to which a notice of qualified acceptance was transmitted in accordance with clause (ii) or (iii) of paragraph (3)(C)—

(i) the decision is reversed, and

(ii) the drug or substance subject to such decision is not required to be controlled under schedule IV or V to carry out the minimum United States obligation under paragraph 7 of article 2 of the Convention,

the order issued under this subparagraph with respect to such drug or substance shall expire upon receipt by the United States of the review decision. If, as a result of action taken pursuant to action initiated under a request transmitted under clause (iv) of paragraph (3)(C), the drug or substance with respect to which such action was taken is not required to be controlled under schedule IV or V, the order issued under this paragraph with respect to such drug or substance shall expire upon receipt by the United States of a notice of the action taken with respect to such drug or substance under the Convention.

(C) An order issued under subparagraph (A) or (B) may be issued without regard to the findings required by subsection (a) of this section or by section 812(b) of this title and without regard to the procedures prescribed by subsection (a) or (b) of this section.

(5) Nothing in the amendments made by the Psychotropic Substances Act of 1978 or the regulations or orders promulgated thereunder shall be construed to preclude requests by the Secretary of Health and Human Services or the Attorney General through the Secretary of State, pursuant to article 2 or other applicable provisions of the Convention, for review

of scheduling decisions under such Convention, based on new or additional information. . . .

Title 21, United States Code, Section 812, provides in part as follows:

§ 812. Schedules of controlled substances

Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970 and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

(1) Schedule I.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

END OF DOCUMENT